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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 BARBARA VELASQUEZ,) No. ED CV 13-1542-AS
12)
13 Plaintiff,) **MEMORANDUM AND OPINION**
14 v.)
15)
16 CAROLYN W. COLVIN,)
Acting Commissioner of the)
Social Security Administration,)
17 Defendant.)
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20)
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28)

18 **PROCEEDINGS**

20 Plaintiff Barbara Velasquez ("Plaintiff"), a former fast food
21 worker, asserts disability since June 1, 2009, based on alleged
22 physical impairments. (A.R. 102, 105). The Administrative Law Judge
23 ("ALJ") examined the record and heard testimony from Plaintiff and a
24 vocational expert on February 8, 2012. (A.R. 24-37). On February
25 29, 2012, the ALJ denied Plaintiff benefits in a written decision.
26 (A.R. 8-23). On July 10, 2013, the Appeals Council denied review of
27 the ALJ's decision. (A.R. 1-3).
28

1 On September 4, 2013, Plaintiff filed a Complaint, pursuant to
2 42 U.S.C. §§ 405(g) and 1383(c), alleging that the Social Security
3 Administration erred in denying her disability benefits (Docket Entry
4 No. 3). On December 31, 2013, Defendant filed an Answer to the
5 Complaint, and the Certified Administrative Record ("A.R.") (Docket
6 Entry Nos. 13, 14). The parties have consented to proceed before a
7 United States Magistrate Judge (Docket Entry Nos. 9, 11). On April
8 11, 2014, the parties filed a Joint Stipulation ("Joint Stip.")
9 setting forth their respective positions on Plaintiff's claim (Docket
10 Entry No. 18).

11 12 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

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14 "Social Security disability benefits claimants have the burden
15 of proving disability." Bellamy v. Sec'y Health & Human Serv., 755
16 F.3d 1380, 1380 (9th Cir. 1985). A claimant is disabled if she has
17 the "inability to engage in any substantial gainful activity by
18 reason of any medically determinable physical or mental
19 impairment...which has lasted or can be expected to last for a
20 continuous period of not less than 12 months." 42 U.S.C.
21 § 423(d)(1)(A). In order to determine whether a claimant is
22 disabled, ALJs follow a five-step process set forth in 20 C.F.R.
23 § 404.1520(a)(4). "The claimant bears the burden of proving steps
24 one through four." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir.
25 2007).

26
27 At step one, the ALJ must determine whether or not the claimant
28 is actually engaged in any "substantial gainful activity," as defined

1 by 20 C.F.R. § 404.1572. If claimant is not so engaged, the
2 evaluation continues to step two. See 20 C.F.R. § 404.1520(a)(4)(i).

3
4 At step two, the ALJ determines whether the claimed physical or
5 mental impairments are severe. 20 C.F.R. § 404.1520(a)(4)(ii). When
6 determining severity, "the ALJ must consider the combined effect of
7 all of the claimant's impairments on her ability to function, without
8 regard to whether each alone was sufficiently severe." Smolen v.
9 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing 42 U.S.C.
10 § 423(d)(2)(B)). Impairments are considered severe unless the
11 evidence "establishes a slight abnormality that has 'no more than a
12 minimal effect on an individual's ability to work.'" Id. at 1290
13 (quoting Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)). "[I]f
14 the ALJ concludes that the claimant does have a medically severe
15 impairment, the ALJ proceeds to the next step in the sequence." Webb
16 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005); See 20 C.F.R.
17 § 404.1520(a)(4)(ii).

18
19 At step three, the ALJ considers whether the claimant's severe
20 impairments are disabling. 20 C.F.R. § 404.1520(a)(4)(iii). The
21 claimant is considered disabled if her purported conditions meet or
22 are medically equivalent to a listing found in 20 C.F.R. Part 404,
23 Subpart P, Appendix 1. Burch v. Barnhart, 400 F.3d 676, 679 (9th
24 Cir. 2005). "[An] impairment is medically equivalent to a listed
25 impairment in appendix 1 if it is at least equal in severity and
26 duration to the criteria of any listed impairment." 20 C.F.R.
27 404.1526. "Medical equivalence must be based on medical findings[]"
28 rather than "[a] generalized assertion" or opinion testimony

1 regarding "functional problems." Tackett v. Apfel, 180 F.3d 1094,
2 1100 (9th Cir. 1999) (citing 20 C.F.R. § 404.1526).

3
4 If the ALJ concludes that claimant is not disabled at step
5 three, the ALJ moves to step four and considers whether the claimant
6 can return to her past relevant work. Burch, 400 F.3d at 679; See 20
7 C.F.R. § 404.1520(a)(4)(iv). In order to do so, the ALJ determines
8 claimant's Residual Functional Capacity ("RFC"). 20 C.F.R.
9 § 404.1520(a)(4)(iv). A claimant's RFC is "what [claimant] can still
10 do despite [claimant's] limitations," and is "based on all the
11 relevant medical and other evidence in [the] case record." 20 C.F.R.
12 416.945(a)(1). If the claimant's RFC dictates that she can return to
13 her past relevant work, she is not considered disabled. Burch, 400
14 F.3d at 679.

15
16 If the claimant proves in step four that she cannot return to
17 her past relevant work, the ALJ proceeds to step five. 20 C.F.R.
18 § 404.1520(a)(4)(v). At step five "the burden of proof shifts to the
19 Secretary to show that the claimant can do other kinds of work."
20 Embrey v. Bowden, 849 F.2d 418, 422 (9th Cir. 1988). At this point,
21 ALJs "can call upon a vocational expert to testify as to: (1) what
22 jobs the claimant, given his or her [RFC], would be able to do; and
23 (2) the availability of such jobs in the national economy." Tackett,
24 180 F.3d at 1101. If claimant does not have the RFC to work in any
25 available jobs, she is considered disabled. 20 C.F.R.
26 § 404.1520(a)(4)(v).

BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

In applying for disability insurance benefits, Plaintiff alleged the following disabling severe impairments: arthritic knee pain, diabetes, asthma, and joint pain, and alleged that the onset date of these impairments was June 1, 2009. (A.R. 102, 105). Additionally, at the hearing before the ALJ on February 8, 2012, Plaintiff testified that she has pain in both knees and her lower back. (A.R. 29). She testified that sometimes she takes Vicodin two to three times a day, due to the pain. (A.R. 33). Plaintiff claimed that she cannot walk for more than five minutes at a time, or stand for more than ten to fifteen minutes at a time. (A.R. 29). Plaintiff also stated that she uses an albuterol inhaler daily, and takes daily medication for her diabetes. (A.R. 30–31). She further testified that she left work in 2003 due to a complicated pregnancy, and that she has been unable to find work since then. (A.R. 32).

The ALJ applied the five-step evaluation process to determine whether Plaintiff was disabled. (A.R. 13–19). At step one, the ALJ determined that Plaintiff was not engaged in any “substantially gainful activity.” (A.R. 13). At step two, the ALJ found that Plaintiff suffers from the following severe impairments: morbid obesity, mild bilateral chondromalacia patellae, diabetes mellitus, and asthma. (Id.). The ALJ also noted that Plaintiff has a history of skin cancer, a right ankle sprain, abscesses, a cystic lesion, bilateral epicondylitis, and had surgery to remove a small foreign object lodged in her ear, but did not find these impairments severe

1 because they did not last the durational requirement or did not have
2 "more than a minimal effect" on Plaintiff's ability to work. (Id.).
3

4 At step three, the ALJ determined that Plaintiff's severe
5 impairments did not meet or equal a medical listing found in 20
6 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 13-14). Upon review
7 of the record, the ALJ found that Plaintiff's medically determinable
8 impairments could reasonably be expected to cause the alleged
9 symptoms. (A.R. 15). The ALJ also found, however, that Plaintiff's
10 "statements concerning the intensity, persistence, and limiting
11 effects of these symptoms are not credible." (Id.).
12

13 Before proceeding to step four, the ALJ found that Plaintiff had
14 the RFC to perform light work with the following limitations:

15 lift and carry 20 pounds occasionally and 10 pounds
16 frequently. She can stand and walk for 6 hours out of an
17 8-hour workday, and she can sit for 6 hours out of an 8-
18 hour workday. She can occasionally climb ramps and stairs;
19 and she can occasionally balance, stoop, kneel, crouch, and
20 crawl[]. She cannot climb ladders, ropes, or scaffolds.
21 She should avoid concentrated exposure to gases, dusts,
22 fumes, and environmental irritants. She should avoid
23 extreme cold.

24 (A.R. 14). The ALJ based the RFC finding on the opinions of Dr.
25 Bilezikjian, who conducted an orthopedic consultative examination,
26 and medical consultants Dr. Lockie and Dr. Meek, all of whom
27 determined that Plaintiff had the RFC to perform work at the medium
28 exertion level. (A.R. 17, 171-174, 175-181, 192-193). However, the
ALJ found that Plaintiff had the RFC to perform light work after

1 considering Plaintiff's subjective complaints, her morbid obesity,
2 and the objective medical evidence. (A.R. 17).

3
4 At step four, the ALJ, relying on the testimony of the VE, found
5 that Plaintiff was able to perform her past relevant work as a fast
6 food worker, as generally performed. (A.R. 17-18, 34).

7
8 Alternatively, the ALJ found that, in addition to her past
9 relevant work, Plaintiff was also able to perform other jobs existing
10 in significant numbers in both the regional and national economies,
11 such as an "assembler, small products," a "cashier II," or a
12 "cleaner/housekeeper." (A.R. 18). The ALJ's findings relied on the
13 testimony of the VE, who considered all of Plaintiff's limitations in
14 providing his opinion. (A.R. 33-36). As a result of these findings,
15 the ALJ concluded that Plaintiff was not disabled under 42 U.S.C. §
16 423(d) (1) (A).

17 18 STANDARD OF REVIEW

19
20 This court reviews the Administration's decision to determine
21 if: (1) the Administration's findings are supported by substantial
22 evidence; and (2) The Administration used proper legal standards.
23 Smolen, 80 F.3d at 1279. "Substantial evidence is more than a
24 scintilla, but less than a preponderance." Andrews v. Shalala, 53
25 F.3d 1035, 1039 (9th Cir. 1995). To determine whether substantial
26 evidence supports a finding, "a court must consider [] the record as
27 a whole, weighing both evidence that supports and evidence that
28 detracts from the [Commissioner's] conclusion." Reddick v. Chater,

1 157 F.3d 715, 720 (9th Cir. 1998). As a result, "[i]f evidence can
2 reasonably support either affirming or reversing the ALJ's
3 conclusion, [a] court may not substitute its judgment for that of the
4 ALJ." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th
5 Cir. 2004).

6 7 **PLAINTIFF'S CONTENTION**

8
9 Plaintiff contends that the ALJ erred in her assessment of
10 Plaintiff's credibility, and failed to provide clear and convincing
11 reasons for rejecting Plaintiff's testimony. (Joint Stip. 2-10).

12 13 **DISCUSSION**

14
15 After consideration of the record as a whole, the Court finds
16 that the Commissioner's findings are supported by substantial
17 evidence and are free from material¹ legal error.

18 19 **A. The ALJ Did Not Err in Evaluating Plaintiff's Credibility**

20
21 If a claimant asserts that pain is the primary reason a severe
22 impairment is disabling, the claimant's testimony regarding her
23 subjective symptoms may be crucial to the ALJ's evaluation. See
24 Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir 1995). The ALJ must

25
26 ¹ The harmless error rule applies to the review of administrative
27 decisions regarding disability. See McLeod v. Astrue, 640 F.3d 881,
28 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d 676, 679 (9th
Cir. 2005) (stating that an ALJ's decision will not be reversed for
errors that are harmless).

1 make "an explicit credibility finding whenever the claimant's
2 credibility is a critical factor in the Secretary's determination."
3 Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). In order to
4 determine whether a claimant's testimony is credible, the ALJ engages
5 in a two-step analysis. Garrison v. Colvin, 759 F.3d 995, 1014 (9th
6 Cir. 2014).

7
8 First, the claimant "must produce objective medical evidence of
9 an underlying impairment 'which could reasonably be expected to
10 produce the pain or other symptoms alleged.'" Bunnell v. Sullivan,
11 947 F.2d 341, 344 (9th Cir. 1991) (quoting 42 U.S.C. §
12 423(d)(5)(A)(1988)). In producing evidence of the underlying
13 impairment, "the claimant need not produce objective medical evidence
14 of the pain or fatigue itself, or the severity thereof." Smolen, 80
15 F.3d at 1282. Instead, the claimant "need only show that [the
16 impairment] could reasonably have caused some degree of the symptom."
17 Id.

18
19 Second, once the claimant has produced the requisite objective
20 medical evidence, the "ALJ may reject the claimant's testimony
21 regarding the severity of her symptoms." Smolen, 80 F.3d at 1284.
22 Absent affirmative evidence of malingering, however, the ALJ may only
23 reject a plaintiff's testimony "by offering specific, clear and
24 convincing reasons for doing so." Id. In assessing a claimant's
25 alleged symptoms, an ALJ may consider: "(1) ordinary techniques of
26 credibility evaluation, such as claimant's reputation for lying,
27 prior inconsistent statements concerning the symptoms, and other
28 testimony by the claimant that appears to be less than candid; (2)

1 unexplained or inadequately explained failure to seek treatment or to
2 follow a prescribed course of treatment; and (3) the claimant's daily
3 activities." Id. An ALJ may also consider "the claimant's work
4 record and observations of treating and examining physicians and
5 other third parties." Id.

6
7 Here, the ALJ examined the Administrative Record and heard
8 testimony from Plaintiff. (A.R. 13-37). Based on the record, the
9 ALJ determined that Plaintiff had "produce[d] objective medical
10 evidence of an underlying impairment which could reasonably be
11 expected to produce the pain or other symptoms alleged." (A.R. 15).
12 However, the ALJ rejected the claimant's testimony regarding the
13 disabling effects of her symptoms, and offered specific, clear and
14 convincing reasons for doing so. (A.R. 15-17). The reasons given by
15 the ALJ are supported by the record.

16
17 Conservative Treatment

18
19 "[E]vidence of 'conservative treatment' is sufficient to
20 discount a claimant's testimony regarding the severity of an
21 impairment." Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007)
22 (holding that Plaintiff's use of over-the-counter pain medications to
23 treat pain was inconsistent with Plaintiff's claims that pain was
24 disabling). Here, the ALJ pointed out that on a number of clinical
25 visits, Plaintiff stated that she was only taking Tylenol or
26 ibuprofen in order to manage her pain. (A.R. 16-17, 171, 250, 263,
27 327, 361, 385). Furthermore, the ALJ included in her decision the
28 fact that December 26, 2011, was the "only time recently that any

1 care provider has prescribed [Plaintiff] Vicodin." (A.R. 17, 450).
2 Accordingly, the ALJ properly relied on the medical records which
3 showed that, until recently, plaintiff had largely treated her pain
4 with the use of over-the-counter medication in discounting
5 Plaintiff's assertions regarding the severity of her pain.

6
7 Objective Medical Evidence

8
9 While a claimant's testimony regarding her symptoms "cannot be
10 rejected on the sole ground that it is not fully corroborated by
11 objective medical evidence, the medical evidence is still a relevant
12 factor in determining the severity of the claimant's pain and its
13 disabling effects." Rollins v. Massanari, 261 F.3d 853, 857 (9th
14 Cir. 2001) (citing 20 C.F.R. § 404.1592(c)(2)); Burch v. Barnhart,
15 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence
16 cannot form the sole basis for discounting pain testimony, it is a
17 factor that the ALJ can consider in his credibility analysis.").
18 Here, the ALJ found that, despite Plaintiff's claims of disabling
19 impairments, Plaintiff's "[medical] treatment has consisted largely
20 of visits for minor issues and transient complaints." (A.R. 17).
21 This finding is supported by the record.

22
23 Of the numerous occasions on which Plaintiff sought medical
24 treatment in 2010 and 2011, only a few involved complaints of back or
25 knee pain. (A.R. 276, 361, 371, 396, 427).² The ALJ found that
26 despite her complaints of debilitating knee pain, "x-rays of

27
28 ² It should be noted, however, that two of Plaintiff's visits were
the result of knee pain that occurred after she fell. (A.R. 361,
396).

1 [Plaintiff's] knee have been normal." (A.R. 17, 173, 386, 391).
2 Furthermore, the ALJ reiterated Dr. Bilezikjian's findings that
3 Plaintiff "is able to move about the office slowly, without any
4 assistance, and is able to get onto and off the examination
5 table...without any assistance or difficulty." (A.R. 15, 172). The
6 ALJ also noted Dr. Bilezikjian's observations that Plaintiff's gait
7 appeared normal, her knees displayed "no instability," and that she
8 "[did] not use assistive devices or braces for normal ambulation."
9 (A.R. 15, 172-173).

10
11 With respect to Plaintiff's asthma, the ALJ pointed out that
12 although Plaintiff suffers from asthma, there is "no evidence of
13 emergency room visits or hospitalization for acute asthma
14 exacerbation." (A.R. 17). Because Plaintiff's allegations of pain
15 are unsupported by objective medical evidence, the ALJ properly found
16 Plaintiff's statements regarding the disabling effects of her
17 symptoms to be less than credible.

18
19 Contradiction With The Medical Record

20
21 "Contradiction with the medical record is a sufficient basis for
22 rejecting the claimant's subjective testimony." Carmickle v. Comm'r
23 Soc. Sec. Admin., 533 F.3d 1155, 1161 (9th Cir. 2008). Here, the ALJ
24 found that Plaintiff's statements regarding her use of Vicodin were
25 contradicted by the medical record. (A.R. 16). Plaintiff testified
26 that, in order to manage the disabling pain in her knees and lower
27 back, she takes Vicodin two to three times per day. (A.R. 29).
28 However, the ALJ noted that December 26, 2011, was the "only time

1 recently that any care provider has prescribed [Plaintiff] Vicodin[]"

2 (A.R. 17, 450), and that "the record does not show any ongoing

3 prescription or treatment for her pain or ongoing prescriptions for

4 Vicodin." (A.R. 16). Accordingly, Plaintiff's testimony that she

5 required a prescription drug as powerful as Vicodin in order to

6 manage her pain is undercut by the medical record. Plaintiff

7 contends that she "misunderstood" the ALJ's questions about when and

8 how often she took Vicodin. (Joint Stip. 7). This argument is

9 unavailing. Plaintiff testified that she must take Vicodin multiple

10 times a day to manage her disabling pain *in response to questioning*

11 *by her own attorney*. (A.R. 29). The ALJ's questions were limited to

12 when she had been prescribed Vicodin and who prescribed it.

13 Therefore, Plaintiff's testimony about taking Vicodin in a continuous

14 manner in order to manage her discomfort was not ambiguous or based

15 on any misunderstanding of what was being asked of her. Because

16 Plaintiff's testimony about her use of Vicodin is belied by the

17 medical record, the ALJ correctly found Plaintiff's testimony about

18 the use of Vicodin to be less than forthcoming and self-serving.

19

20 Inconsistent Statements

21

22 An ALJ may rely on "ordinary techniques of credibility

23 evaluation" in considering Plaintiff's credibility. Smolen, 80 F.3d

24 at 1284. As a result, "the adjudicator may discredit the claimant's

25 allegations based on inconsistencies in the testimony," Bunnell, 947

26 F.2d at 346, or based on "inconsistencies between...the testimony and

27 the claimant's conduct," Molina v. Astrue, 674 F.3d 1104, 1112 (9th

28 Cir. 2012). The ALJ found that Plaintiff "made inconsistent

1 statements regarding why she stopped working." (A.R. 17, 32, 134,
2 171). The record supports this finding. At the administrative
3 hearing, Plaintiff testified that quit working in 2003, due to
4 complications with her pregnancy. (A.R. 32). When Plaintiff applied
5 for disability insurance benefits, however, she claimed that she
6 stopped working on June 1, 2009, due to knee pain. (A.R. 134).
7 Plaintiff told Dr. Bilezikjian, at her orthopedic consultation, that
8 she quit work in 2004 to take care of her children. (A.R. 171). The
9 ALJ was entitled to find that these inconsistencies adversely
10 affected Plaintiff's credibility. Additionally, the ALJ also
11 discredited Plaintiff's testimony regarding debilitating asthma
12 because Plaintiff continues to smoke, (A.R. 17, 32, 172),³ and noted
13 that despite Plaintiff's claims that she requires frequent rest
14 throughout the day, Plaintiff testified that she spends her day
15 keeping busy with household chores. (A.R. 30). The ALJ was entitled
16 to rely on these factors in her assessment of Plaintiff's
17 credibility.

18
19 Even though Plaintiff only challenges the ALJ's adverse
20 credibility findings based upon her poor work history, statements
21 concerning Vicodin usage, and daily activities, (Joint Stip. 2-10),
22 the ALJ's decision to deny benefits was also based on the ALJ's
23 findings about the lack of objective medical evidence, conservative

24 ³ Plaintiff told Dr. Bilezikjian that she smokes two cigarettes
25 per day, (A.R. 172), and her medical records also reflect that she
26 smokes. (A.R. 219, 222, 232, 250, 263, 290, 313, 345, 371, 427).
27 However, when asked by the ALJ whether she smokes, Plaintiff
28 responded "[i]t's not a big issue. I could quit. I could go a week
without one or a month." The ALJ was entitled to find, based on the
facts, that Plaintiff was likely attempting to understate this
detrimental fact. (A.R. 32).

1 treatment, and inconsistent statements, (A.R. 15-17). As a result,
2 even if this Court were to accept all of Plaintiff's arguments, which
3 it does not, the ALJ's decision would still be supported by
4 substantial evidence.

5
6 **CONCLUSION**

7
8 "If the ALJ's credibility finding is supported by substantial
9 evidence in the record, we may not engage in second guessing."
10 Thomas, 278 F.3d at 958-959. Here, the ALJ provided specific, clear
11 and convincing reasons for discounting Plaintiff's statements
12 regarding her subjective symptoms. Therefore, the ALJ's decision
13 that Plaintiff failed to establish disability was properly based upon
14 substantial evidence.

15
16 **ORDER**

17
18 For all of the foregoing reasons, this Court affirms the
19 decision of the Administrative Law Judge.

20
21 LET JUDGMENT BE ENTERED ACCORDINGLY.

22
23 Dated: November 19, 2014.

24 /s/
25 ALKA SAGAR
26 UNITED STATES MAGISTRATE JUDGE
27
28